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Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LOCAL 18, INTERNATIONAL UNION
OF OPERATING ENGINEERS,
Petitioner,

v.

ERVIN SHIMMAN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress, in passing the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.*, intended to deny to unions—and to their members acting through the union's internal democratic processess—the right to publish newspapers that are subject to the editorial control of the union's duly elected leaders, and to require instead that union newspapers must be public fora, open to any member who wishes to express a dissenting view on any controversial internal union matter.

PARTIES

In addition to Local 18, the caption of this case in the United States Court of Appeals for the Sixth Circuit lists as a defendant-appellee Frank J. Miller. Mr. Miller—who had served as the Business Manager of Local 18 and the Editor of its newspaper—died on October 20, 1990. Accordingly, the district court dismissed Miller from the case and this dismissal was not appealed. App. 11a. The opinion below also includes in the caption International Union of Operating Engineers Local Numbers 18A, 18B, 18C, 18RA, and 18G, but these are mere subdivisions of Local 18 and have no legal status separate from that of Local 18.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Local 18, International Union of Operating Engineers (hereinafter "Local 18"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in *Shimman v. Miller, et al.*, 6th Cir. No. 92-3399 (June 14, 1993).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported at 995 F.2d 651 (1993), and is reprinted in the Appendix ("App.") to this Petition at 1a. The Decision and Order of the United States District Court for the Northern District of Ohio, which is unreported, is reprinted at App. 10a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 14, 1993. A timely petition for rehearing was denied by the Sixth Circuit on July 27, 1993. App. 16a.

On October 4, 1993, by order of Justice Stevens, the time for filing this Petition was extended to and including November 23, 1993. On November 15, 1993, by order of Justice Stevens, the time for filing this Petition was further extended to and including December 3, 1993.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 101(a)(2) of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 411(a)(2), provides as follows:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Section 102 of the LMRDA, 29 U.S.C. § 412, provides as follows:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

The First Amendment to the United States Constitution provides in relevant part as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

STATEMENT OF THE CASE

1. On February 29, 1984, the United States Senate Committee on Labor and Human Resources held a hearing—convened by its Chairman, Senator Orrin Hatch—on allegations of various unlawful activities by construction trades unions. Respondent Shimman, a member of Local 18, International Union of Operating Engineers, Respondent Shimman's attorney, and a second member of Local 18, were among the witnesses. Each testified that Local 18 had operated its hiring hall in a manner which discriminated against political opponents of the Union's leadership. Although Local 18's attorney, William Fadel, had requested the right to appear at the hearing to present Local 18's response to these allegations, and had made arrangements to appear, Mr. Fadel was told by Senator Hatch at the hearing that he would not be permitted to make any presentation, but could only submit a subsequent written statement.

2. Local 18 publishes a union newspaper, the *Buckeye Engineer*. Under the Union's Bylaws, the *Buckeye Engi-*

neer serves as "the Official Publication" of Local 18, to "be mailed to all members of the Local Union." The Union's Bylaws provide as well that Local 18's chief elected officer—the Business Manager—serves as the Editor of the *Buckeye Engineer,* subject to directions and policies laid down by the Union's elected executive board. J.A. 69 (Local 18 Bylaws, Article XXIX, § 2).

One feature in the *Buckeye Engineer* is a column, entitled "Report to the Members," by the Union's Business Manager. The April, 1984 column commented on the Senate Hearing just noted. The relevant text stated:

> Recently Local 18 received a letter from the Senate Committee on Labor and Human Resources asking Local 18 to appear and testify. Please understand, contrary to allegations, Local 18 is not under investigation. This Senate Committee was only taking testimony for proposed labor legislation.
>
> The notorious anti-union senator, right-wing Republican Orrin Hatch from Utah, conducted the hearings in absence of other committee members, with the exception of brief appearances by two fellow conservative Republicans. The hearings were neither fair nor impartial.
>
> Two members of Local 18 were permitted to testify as was a lawyer representing members suing Local 18. Although the committee was notified in advance, Local 18's lawyer was not permitted to testify or present documents which would have clearly shown that the allegations and accusations were false or misleading. Most of the events giving rise to the allegations made by the two Local 18 members occurred in the late 1960's and mid-1970's, all of which have been litigated in the courts and are still pending on appeal. [App. 11a-12a.]

In response to this column, Respondent Shimman submitted the following letter to the Union's Business Manager:

I appeared before the Senate Committee on Labor and Human Resources of which you in your "Report to the Members" in the April 1984 issue of the Buckeye Engineer called this a Anti-Union Senate hearing.

The truth is this hearing was held for the allegations of corruption in the I.U.O.E. of Louisiana Local 406 and Ohio Local 18.

Testimony was given not just of happenings in the past but right up to the present day.

Testimony was given as to the manipulation of the Referral by friends and relatives of Business Agents and Officers of Local 18. Local 18 continues to discriminate in favor of Business Agents and Officers' friends and relatives.

Officers and Agents continue to try to remove members off their jobs.

Business Manager Miller was invited to testify but declined.

Local 18 counsel William Fadel, was offered to present material to the Committee but never did.

Testimony was given as to the articles in the Buckeye Engineer being one-sided.

As you being the editor, I am asking you to print this article so I too can get the truth before all the members of Local 18.

Member of 38 years in Local 18. [App. 12a.]

The *Buckeye Engineer* did not publish Shimman's letter. In fact, the Union newspaper had never published letters submitted by members. Rather, the *Buckeye Engineer* was principally a means by which the Union's elected officers communicated with the Union's membership on issues that the leadership deemed important to the Union. App. 14a.

3. When the *Buckeye Engineer* declined to publish his letter, Shimman brought this action. Shimman claimed

that, by publishing in its official newspaper a column stating one side of a subject of controversy within the Union and refusing to publish his response, Local 18 had violated his right of free speech as a union member, as provided in § 101(a)(2) of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(2).

After a trial on a submitted record, the District Court for the Northern District of Ohio dismissed Shimman's claim. That court held that the *Buckeye Engineer* was not a "public forum," but a private newspaper published under the editorial direction of the elected officers of Local 18. Since the Union had never followed a policy of treating the newspaper as a "public forum," its refusal to publish Shimman's letter "does not constitute an unreasonable act of censorship in derogation of plaintiff's rights under § 411(a)(2)". App. 15a. As the district court put it, "because the *Buckeye Engineer* has not been opened as a 'public forum,' what articles are published lies not within the judgment of [a] Court, but rather within the discretion of the Union's Business Manager." App. 15a.

In reaching this conclusion, the district court relied *inter alia* on the decision of the United States Court of Appeals for the Second Circuit in *Sheldon v. O'Callighan*, 497 F.2d 1276 (2d Cir.), *cert. denied*, 419 U.S. 1090 (1974), and on two distinct court decisions following this Second Circuit decision, *see Members for a Democratic Union v. Local 1011, CWA*, 697 F. Supp. 771 (S.D.N.Y. 1987); *Roman v. New York State Teachers*, 655 F. Supp. 422 (S.D.N.Y. 1987). App. 14a.

4. The United States Court of Appeals for the Sixth Circuit reversed the district court and held that LMRDA § 101(a)(2) requires Local 18 to publish Shimman's letter in its newspaper.

The Sixth Circuit, in essence, reasoned that, to effectuate the LMRDA's "free speech" provision, Local 18's

newspaper must be deemed an "open forum" for the dissemination of member views on issues of controversy. Accordingly, that court determined that the editors of Local 18's newspaper were barred from making any content based decisions not to publish materials on such an issue submitted by members in response to views expressed in the newspaper.

First, the Sixth Circuit noted that the union's membership is geographically dispersed and its mailing lists are not made generally available, and that the newspaper should therefore be regarded as "the exclusive means of communication for members wishing to present an alternate point of view to other union members." App. 7a.

Second, the court below focused on the fact that the *Buckeye Engineer* is financed from Local 18 funds, so that each union member could be considered a co-owner of the paper. App. 7a.

And third, that court surveyed the prior editorial policies and practices of the *Buckeye Engineer* and determined that "those in charge of the *Buckeye Engineer*"—*viz.*, the elected officers of Local 18—"use it as a platform for the opinions of individuals who support[] Local 18's incumbent management and its views." App. 8a.[1]

On these bases, the Sixth Circuit concluded that the elected editor of the *Buckeye Engineer,* and the elected executive board that supervises him, must "print plaintiff's letter" and "must comply in the future with their obligation to accommodate free discussion by members in the pages of [Local 18's] publication." App. 9a. According to the Sixth Circuit, the opposite result "would contra-

[1] This conclusion rested on the fact that the newspaper in the past had published (a) the Business Manager's column; (b) articles by the labor-supported Governor of Ohio, which presented a favorable view of the labor movement and its political allies; and (c) one anonymous column—published two years after the controversy here—which denounced attacks on the labor movement in general and on Local 18 in particular. App. 7a-8a.

vene the Act's overriding objective of promoting union democracy." App. 8a-9a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CLEAR CONFLICT BETWEEN THE SIXTH CIRCUIT AND THE SECOND CIRCUIT ON AN IMPORTANT ISSUE OF LAW RELATING TO THE FREE PRESS RIGHTS OF UNIONS

As a general matter, freedom of the press in this country embraces the right of the publishers of a periodical to exercise editorial control over the publication in order to determine the publication's purpose, its form and its contents. And, again as a general matter, freedom of association buttresses that right by safeguarding the right of private associations, through their own processes, to establish official publications, under the editorial control of elected or appointed editors, for the purpose of stating the views of the organization and its leadership, and of recommending those views to the membership.

There is a clear conflict between the Sixth Circuit and the Second Circuit as to whether Congress, in passing the LMRDA, intended to deny to unions—and to their members acting through the union's internal democratic processes—the right to publish newspapers that, like the newspapers of any other organization, are subject to the editorial control of the union's duly elected leaders, and to require instead that union newspapers must be public fora, open to any member who wishes to express a dissenting view on any "controversial" matter.

The Sixth Circuit in the decision below held that Congress did so intend. The Second Circuit, in *Sheldon v. O'Callighan, supra,* held precisely to the contrary.

Sheldon involved LMRDA claims by three members of the International Organization of Masters, Mates and Pilots who opposed suggested constitutional amendments that the union's leadership had referred to the member-

ship for a referendum vote. The plaintiffs, challenging the referendum procedures, alleged that because the international officers had discussed the proposed constitutional amendments in the union's newspaper in a manner that emphasized the amendments' advantages—and minimized their disadvantages—the LMRDA required publication in the union newspaper of a statement submitted by plaintiffs explaining their objections to the amendments.

In rejecting this claim, the Second Circuit began from the proposition that in the LMRDA "Congress sought to strike a balance between rights for individual members and the recognized institutional requirements necessary for a union to be an effective bargaining force." 497 F.2d at 1281 (*quoting* Griffin, *The Landrum-Griffin Act*, 5 Ga. L. Rev. 622 (1971)). That court then recognized that a union and its members have every right to choose to operate a newspaper under the editorial control of a democratically elected leadership, so that the leadership may inform, advise, and persuade the membership with regard to important issues, and so that the leadership may be judged by the membership for their exercise of this responsibility. Accordingly, the Second Circuit concluded that a union is *not* obliged to operate a newspaper that provides each member an open forum for the expression of the membership's diverse views:

> The duly elected officers of a union have a right and a responsibility to lead, and to give the members the benefit of advice on questions that arise. They have a right to use the union publications to express their views, and are not ordinarily required to give space therein to the expression of contrary views, provided they do not interfere improperly with whatever rights members may have to communicate their views to other members. [497 F.2d at 1282.]

B. Put simply, under the decision below, the LMRDA makes it unlawful for duly authorized union leaders to

exercise normal editorial control of the union's official newspaper: *viz.*, to exercise the right to determine what to publish and what not to publish. In contrast, under *Sheldon,* the LMRDA leaves that basic editorial right intact. Thus, where the members so determine, normal editorial control can lawfully be exercised by those union officers that the union membership has democratically elected.

This conflict not only causes confusion in the administration of a basic federal statute covering tens of thousands of labor organizations and millions of their members, but has the consequence of placing publishers of national or international union periodicals in an impossible position. Any union that has members within, as well as outside of, the Sixth Circuit, and that distributes a periodical throughout the nation, may be subject to the broad repsonse rights stated in the decision below. Such a rule will inevitably chill the editorial freedom of the union press.

II. THE DECISION BELOW IS CLEARLY WRONG; THE DECISION HAS NO SUPPORT IN THE STATUTORY LANGUAGE, STRUCTURE OR LEGISLATIVE MATERIALS, IS CONTRARY TO THIS COURT'S STATEMENT OF THE LMRDA'S OVERALL PURPOSES, AND RAISES SERIOUS CONSTITUTIONAL QUESTIONS REGARDING THE FIRST AMENDMENT RIGHTS OF FREE PRESS AND FREE ASSOCIATION

By any fair assessment, both the holding and the reasoning of the Sixth Circuit are incorrect, and the contrary holding and reasoning of the Second Circuit are correct. Indeed, the Sixth Circuit's approach is doubly wrong; that approach is insupportable looking at this case as one of pure statutory interpretation and also raises the most serious constitutional questions.

A. The statutory language on which respondent's case rests is LMRDA § 101(a)(2)'s guarantee that "[e]very member of any labor organization shall have the right to meet and assemble freely with other members; and to ex-

press any views, arguments, or opinions . . . ." 29 U.S.C. § 411(a)(2). This statutory language is most naturally understood, in the words of this Court, as a guarantee of "the rights of union members to freedom of expression without fear of sanctions by the union." *Finnegan v. Leu*, 456 U.S. 431, 435 (1982).[2]

It is very much to the point that in this case respondent has suffered *no sanction of any kind* at the hands of his union.

In contrast, nothing in these words connote a congressional intention to impose on unions any general duty to facilitate—much less finance—any individual member's speech. These words certainly imply no intention to burden the freedom of union leaders to communicate with the union's members. And, as we now show, the overall structure of the LMRDA, as well as the legislative evolution of the statute, confirm that Congress had no such intentions.

First, LMRDA § 101(a)(2) contains language ensuring union members access to one and only one kind of union-provided forum of communication, the official union meeting. *See* 29 U.S.C. § 411(a)(2) (every member shall have right "to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's

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[2] The principal sponsor of LMRDA § 101(a)(2), Senator McClellan, described this provision's meaning in much the same terms:

> That [provision] gives union members the right to assemble in groups, if they like, and to visit their neighbors and to discuss union affairs, and say what they think, or perhaps discuss what should be done to straighten out union affairs, or perhaps discuss the promotion of a union movement, or perhaps a policy in which they believe. They would be able to do all of that without being punished for doing it, as is actually happening today. [105 Cong. Rec. 5812 (daily ed. April 22, 1959), *reprinted in* 2 NLRB, *Legislative History of the LMRDA* 1104 (1959).]

established and reasonable rules pertaining to the conduct of meetings").

The fact that this one forum is singled out and opened to free membership participation, and that this is done through such specific statutory language, is powerful evidence that Congress had no intent to create a general right of access to all union-created methods of communications. *See Gozlon-Peretz v. United States,* 498 U.S. 395, 404-405 (1991); *General Motors v. United States,* 496 U.S. 530, 541 (1990).

Second, elsewhere in the LMRDA, Congress included a provision that requires unions to assist certain efforts of members to disseminate their views (as well as a provision that limits the ability of the union itself to participate in certain internal union debates), *but these provisions apply only in the specialized context of officer elections. See* 29 U.S.C. § 481(c) (requiring unions to distribute candidate mailings to membership at candidate's expense); *id.* § 481(g) (prohibiting use of union funds, including use of union-financed newspaper, to promote any particular candidate in officer elections).

Once again, the fact that the LMRDA does contain those specific access rules for the election context, but contains no access provision that would even arguably apply to the context of this case, is a strong indication that Congress did not intend to impose any such affirmative obligations (or any such disabilities) on unions in other contexts.[3]

Third, Congress in adopting these special guarantees regarding the election context specifically recognized that *outside the election context* the union leadership would, of

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[3] Indeed, the fact that, even when an affirmative duty was contemplated, that duty was merely the duty to allow members to inspect membership lists—to facilitate communications by mail *at the member's expense*—shows that there was no sentiment in Congress to require a union to finance the dissemination of a member's views.

necessity, have unique access to the union's official means of communicating with the membership. But Congress viewed this attribute of leadership as one that requires a legislative check only in the election context. Congress did not seek to impose more general affirmative access obligations on unions (or more general disabilities on the union leadership). *See* 2 NLRB, Legislative History of the LMRDA 1241 (Sen. Javits) ("when a union has elected an officer, it has vested in him many responsibilities—funds, reputation, direction, and so forth, including [control of] the [union's mailing] list. My amendment [requiring unions to send out a candidate's mailings at the candidate's expense] seeks to equalize the situation *when it comes to election time.*" (emphasis added)); *see also Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 476 (1991) ("[t]he statutory guarantees [in the election context] are specifically designed to offset the inherent advantage over potential rank and file challenges possessed by incumbent union leadership . . . [including] the incumbents' control of 'the union newspaper which is the chief vehicle for communication with the members' ") (*quoting* Hearings on S.505, Subcommittee on Labor of the Senate Comm. on Labor and Public Welfare, 86th Cong., 1st Sess. 134 (1959)).[4]

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[4] It is true that in *Sheldon, supra*, the Second Circuit imposed an obligation on unions to fail literature to the membership at a member's request and expense in the context of a *referendum* election, even though 29 U.S.C. § 481(c) only imposes this obligation in the context of an *officer* election. But the Second Circuit limited its imposition of any such affirmative obligation to the election context—*viz.*, where the membership is directly exercising its franchise—and that court made clear that those seeking union assistance in distributing their message would have to pay the cost. As noted, the Second Circuit in *Sheldon*—unlike the Sixth Circuit below—rejected the concept that an individual member has any right of access to the union's publications or any right to impose on the union the costs of circulating the member's message. *See* 497 F.2d at 1281-83.

Fourth, the language of § 101(a)(2)'s "free speech" provision stands in sharp contrast with alternative "free speech" language before the 1959 Congress. In an earlier version of the "bill of rights" for union members, H.R. 4473 as introduced by Representative Barden, the free speech right was worded so as to place an affirmative obligation on unions to assist in members' efforts to disseminate their views. The provision declared as follows:

> Labor organizations shall guarantee to each member the right to express any views, arguments, or opinion and to disseminate the same, either orally or in printed, graphic, or visual form. In order to assist him in the exercise of such right, each member shall have the right to inspect a list containing the names and last known addresses of all members of the labor organization . . . . [H.R. 4473, 86th Cong. 1st Sess. 10 (*reprinted in* 1 NLRB, Legislative History of the LMRDA 175).]

That the final version of LMRDA § 101(a)(2) contains *no* such general affirmative duty of assistance—but only the far more limited access obligation regarding union meetings—is another confirmation of the conclusion that no such general duty was intended.

The statutory judgments that we have outlined are fully consistent with an overall policy of the LMRDA. As this Court has summarized it: "The Act's overriding objective was to ensure that unions would be democratically governed, and responsible to the will of the union membership as expressed in open, periodic elections," *Finnegan v. Leu*, 456 U.S. 431, 441 (1982). As long as this basic objective is obtained, it was Congress' judgment "that unions should be left free to 'operate their own affairs, as far as possible.'" *Steelworkers v. Sadlowski*, 457 U.S. 102, 117 (1982) (*quoting* S. Rep. No. 1684, 85th Cong., 2d Sess. 4-5 (1958)).[5]

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[5] *See also Carothers v. Presser*, 818 F.2d 926 (D.C. Cir. 1987) (Edwards, J.):

In any case, it is not remotely inconsistent with the concept of democratic government—nor with any specific provisions of the Act—to leave to the union's membership, acting through elected officials who have been chosen pursuant to the Act's democratic procedures, the decision regarding what, if any, affirmative measures should be taken by the union to enhance the speech of individual union members. And, it is certainly not inconsistent with the concept of democratic government—nor with any specific provisions of the Act—to leave to the union's membership, acting through elected officials who have been chosen pursuant to the Act's democratic procedures, the decision regarding what kind of official periodical the union should publish.

B. The Sixth Circuit asserted that its decision implements general free speech principles and therefore advances the concept of union democracy. But, in fact, the opposite is true. The decision below is not firmly rooted in our system of free expression; to the contrary, that decision works a serious intrusion into the First Amendment's free press and free association principles.

1. "[C]ompulsion exerted by government on a newspaper to print that which it would not otherwise print . . . is unconstitutional." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974). In *Tornillo*, this Court therefore struck down as unconstitutional a statute that imposed on the *Miami Herald* an obligation quite

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[T]he "overriding objective" of the LMRDA is to ensure that unions will be "democratically governed." . . . However, in enacting the LMRDA, Congress did not leave courts without guidance in defining this concept of "democracy" in the union setting, for the statute sets forth certain *specific regulations* governing internal union affairs. In other words, "democracy" under the LMRDA is not merely a boundless ideal to be defined by the whim of any dissident voice; rather, the statutory notion of internal union democracy is precisely limited by the scope of the protections codified by Congress in the LMRDA. [*Id.* at 929 (internal citations omitted; emphasis in original).]

similar to that which the Sixth Circuit has imposed on Local 18's *Buckeye Engineer: viz.*, an obligation to print a reply to a previously published editorial on a subject of controversy. The Court did so because any such "[g]overnment-enforced right of access" to the press "exacts a penalty on the basis of the content of a newspaper." *Id.* at 256-257.

Put simply, the *Tornillo* Court held that the First Amendment protects against governmental "intrusion[s] into the function of editors." 418 U.S. at 258. "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Id.* And, the *Tornillo* Court held that the First Amendment's free speech and free press guarantees forbid "governmental regulation of this crucial process." *Id.*

In this regard, the Court reasoned that any imposition on a newspaper of an obligation to print certain material may cause the newspaper to forego printing other material, and that imposing an obligation to print replies regarding matters of controversy "might well" cause editors to "conclude that the safe course is to avoid controversy." 418 U.S. at 257. As a result, this Court concluded that any "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Id.* (*quoting New York Times v. Sullivan*, 376 U.S. 270, 279 (1964)).

The *Tornillo* Court added that any such "[g]overnment-enforced right of access" necessarily requires the state to decide such highly-subjective issues as whether a certain editorial state of affairs constitutes "fair" or "balanced" coverage of news and opinion, despite the fact that such state regulatory judgments are themselves in conflict with the First Amendment:

> [L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper A journal does not merely print observed facts the way a cow is photographed . . . . As soon as the facts are set in their context, you have selection, and editorial selection opens up the way to editorial suppression. Then how can the state force abstention from discrimination in the news without dictating selection? [418 U.S. at 258 n.24 (*quoting* 2 Z. Chafee, *Government and Mass Communication* 633 (1947)).[6]

In this case, the Sixth Circuit construed the LMRDA to require a union newspaper, once it states one side of a controversy, to grant access to any union member wishing to advocate another side, especially where the newspaper has "consistently . . . promote[d] one point of view [*viz.*, that of the union's leadership] on internal union disputes." App. 8a. Given the holding and reasoning of *Tornillo*, such a construction of the LMRDA raises the most serious constitutional issues.

2. The Sixth Circuit rule at issue not only regulates the union press, it regulates union members in structuring their organization so as to enable their elected leaders to convey to the membership the leadership's views and concerns regarding public affairs. This raises a second equally serious constitutional problem:

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[6] *See also Columbia Broadcasting v. Democratic Comm.*, 412 U.S. 94, 126 (1973) ("Under a . . . Government supervised right-of-access system . . . the Commission would be required to oversee far more of the day-to-day operations of broadcaster's conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondents complain of"); *id.* at 145-46 (Stewart, J.) ("Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was far too fragile to be left for a Government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice.").

This Court has recognized that the First Amendment protects the right of an association to establish a newspaper through which the association's leaders may communicate with the membership on matters of associational concern. *See United States v. C.I.O.*, 335 U.S. 106, 121 (1948). As the *C.I.O.* Court stated, any construction of a statute that would burden an association's right to publish "periodicals advising their members . . . of danger[s] or advantage[s] to their interests," would present "the gravest doubt . . . as to its constitutionality." *Id.* And, in *C.I.O.* the Court rejected the proposition that the interests of individual dissenting members of an association such as a union can justify governmental restrictions on such publications. In the Court's words, "[m]embers of unions paying dues . . . know of the practice of their . . . organizations in regularly publishing periodicals. . . . It is unduly stretching language to say that the members . . . are unwilling participants in such normal organizational activities." *Id.*

Most recently, in *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989), this Court reaffirmed that association members have a First Amendment right to structure their association in a manner that grants the association's leaders the freedom to advise the membership on all issues of associational concern. *See id.* at 222-29 (association has right to designate its leaders and to empower that leadership to make endorsements to the membership). The First Amendment, in other words, protects the right of an association to determine its "standard bearer who best represents the [association's] ideologies and preferences," and protects the association's right to act through such a "standard bearer" in communicating with its members. *Id.* at 224. And, the *Eu* Court rejected the propriety of limiting the expressions of an association's leaders as a means of preventing undue leadership influence over the membership, since such a " 'highly paternalistic approach' limiting what people may

hear is generally suspect" under the First Amendment. *Id.* at 223-224 (*quoting Virginia State Bd. v. Virginia Citizens Council,* 425 U.S. 748, 770 (1976)).

The Sixth Circuit nonetheless proceeded on the premise that there is something illegitimate in an associational decision to delegate to its elected leadership full editorial control over its official publication. That premise cannot be squared with *C.I.O.* and *Eu.*

Against this constitutional background even if the Sixth Circuit's construction of LMRDA § 101(a)(2) had had some support in the traditional statutory materials—and as we have shown, it does not—that construction would still have to be rejected in favor of the Second Circuit's reading of the statute. *See DeBartolo v. Florida Gulf Coast Building Trades Council,* 485 U.S. 568, 586 (1988) (statutes should be construed to avoid serious constitutional issues in the absence of compelling contrary evidence.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 92-3399

ERVIN SHIMMAN,
Plaintiff-Appellant,

v.

FRANK J. MILLER, Individually and as Business Manager and Editor of the Buckeye Engineer, LOCAL UNION No. 18, 18A, 18B, 18C, 18RA and 18G, INTERNATIONAL UNION OF OPERATING ENGINEERS; and LOCAL UNION No. 18, 18A, 18B, 18C, 18RA and 18G, INTERNATIONAL UNION OF OPERATING ENGINEERS,
Defendants-Appellees.

Argued March 25, 1993

Decided June 14, 1993

Rehearing Denied July 27, 1993

Alan Miles Ruben (briefed) and Stephen W. Gard (argued and briefed), Cleveland, OH, for plaintiff-appellant.

William Fadel (argued) and Kathleen M. Sasala (briefed), Wuliger, Fadel & Beyer, Cleveland, OH, for defendants-appellees.

Before: NORRIS and SILER, Circuit Judges; and HOOD, District Judge.*

ALAN E. NORRIS, Circuit Judge.

Plaintiff, Ervin Shimman, appeals the district court's judgment for defendants Frank J. Miller and the International Union of Operating Engineers, Local 18, in this action brought pursuant to the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531. We are asked to decide whether defendants' refusal to publish plaintiff's letter to the editor in the union's newsletter violates the free speech provision of the Act, 29 U.S.C. § 411(a)(2).

I.

Out of mounting concern for what it perceived to be a growing trend toward anti-democratic conduct by leaders of some of the nation's labor unions, in 1959 Congress enacted the Labor-Management Reporting and Disclosure Act (the Act). *See* 29 U.S.C. § 401. Among its protections, the Act contains a union member's "Bill of Rights," which guarantees every union member equal voting privileges, rights of free speech and assembly, and a right to bring suit. In its free speech section, the Act provides:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a

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* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

> labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 411(a)(2).

In *Knox County Local, Nat'l Rural Letter Carriers' Ass'n v. National Rural Letter Carriers' Ass'n,* 720 F.2d 936 (6th Cir.1984), this court dealt with a claim that § 411(a)(2) had been violated. There, the officers of the national union had negotiated a collective bargaining agreement with the postal service and used the national union's weekly magazine to urge ratification of the agreement. *Id.* at 937. The local union viewed the proposed contract as deficient and attempted to place an advertisement in the magazine that discouraged the agreement's ratification. The national union refused the ad, contending that it would create "internal union strife." *Id.*

This court noted that § 411 "was designed to allow members to participate actively in a 'democratic' union," and that while it did not incorporate the full body of First Amendment law, *see United Steelworkers v. Sadlowski,* 457 U.S. 102, 109, 102 S.Ct. 2339, 2344, 72 L.Ed.2d 707 (1982), a court's inquiry under § 411 is guided by First Amendment free speech principles. *Id.* 720 F.2d at 938-39. We concluded that the advertisement was the type of speech protected by the First Amendment and the Act. Moreover, the national union's refusal to publish the ad was "purely content-based." *Id.* at 940. This was impermissible because the union had " 'opened the forum' of its publication to the commercial speech of its members and of merchants." *Id.* In sum, the court held that § 411(a)(2) prevents "those in 'control' of a *protected, open* and *exclusive* forum of communication from unreasonably refusing to allow co-owners access to that forum based solely upon the *content* of their expression." *Id.* at 941.

II.

The International Union of Operating Engineers, Local 18, represents between 12,700 and 14,000 operating engineers, who operate cranes, hoists, earth movers, and hauling equipment in eighty-five counties in Ohio and four counties in Kentucky. Since the 1950s, the international union has attracted attention to alleged unfair labor practices. Local 18 has experienced internal turmoil as well. Since the 1970s, this court has been called upon to review a number of disputes involving union members' claims for hiring hall discrimination, assaults, and unfair discipline.[1]

Plaintiff has been a member of Local 18 for over forty years, and has spent much of this time as a dissident in his relationship to officers of the local. He also has run for union office.

In 1984, Senator Orrin Hatch convened hearings of the Senate Committee on Labor and Human Resources to investigate charges of employment referral discrimination in the construction trade, with Local 18 being a target of scrutiny. Plaintiff, another Local 18 member, and their lawyer testified about alleged manipulation of the hiring hall by the local for the purpose of discriminating against those who disagreed with the policies of incumbent union leadership.

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[1] *See, e.g., Murphy v. IUOE, Local 18,* 774 F.2d 114 (6th Cir. 1985) (dissident recovers for work referral discrimination, unfair discipline, intimidation, and physical violence), *cert. denied,* 475 U.S. 1017, 106 S.Ct. 1201, 89 L.Ed.2d 315 (1986); *Shimman v. Frank,* 625 F.2d 80 (6th Cir.1980) (plaintiff's brother beaten at union meeting), later proceeding, *Shimman v. IUOE, Local 18,* 744 F.2d 1226 (6th Cir.1984) (en banc), *cert. denied,* 469 U.S. 1215, 105 S.Ct. 1191, 84 L.Ed.2d 337 (1985); *NLRB v. IUOE, Local 18,* 500 F.2d 48 (6th Cir.1974) (court enforces NLRB finding of violations of National Labor Relations Act for threatening members with loss of employment for opposing incumbent leadership). Miller was also a defendant in the *Murphy* case. *See Murphy,* 774 F.2d at 119.

During this time, defendant Miller was business manager of Local 18 and editor of the local's newsletter, the *Buckeye Engineer.* When Miller became aware of the Hatch hearings, he published an article in the April 1984 issue of the *Buckeye Engineer* informing members that the "notorious anti-union senator, right-wing Republican Orin [sic] Hatch" recently had presided over hearings that were "neither fair nor impartial." In addition, Miller reported that

> [t]wo members of Local 18 were permitted to testify as was a lawyer representing members suing Local 18. Although the committee was notified in advance, Local 18's lawyer was not permitted to testify or present documents which would have clearly shown that the allegations and accusations were false or misleading. Most of the events giving rise to the allegations made by the two Local 18 members occurred in the late 1960's and mid-1970's, all of which have been litigated in the courts and are still pending on appeal.

Plaintiff interpreted this article as attacking him and responded with a letter to the editor. The letter explained the nature of the hearings and the allegations made before the committee and pointed out that Miller had declined the committee's invitation to testify. Plaintiff concluded with a request that his letter be published in the *Buckeye Engineer,* "so I too can get the truth before all the members of Local 18." Miller refused to print the letter. As his deposition testimony makes clear, the only reason for this refusal was that he disagreed with the letter's content.

Plaintiff filed suit in federal district court against Miller and Local 18, alleging that the refusal to publish his letter violated the free speech rights embodied in § 411(a)(2). In addition, he charged that there is no economically feasible alternative method by which to disseminate his message because few members attend meet-

ings and no member is permitted to obtain the union mailing list. He requested the court to require Miller to pay damages, order defendants to print his letter to the editor responding to Miller's April 1984 article in the newsletter, and require defendants to adopt neutral procedures for allowing publication of members' views.

In April 1985, this district court dismissed the complaint for failure to state a claim, and in March 1986, this court reversed, holding that plaintiff had adequately stated a claim for relief.

On remand, after the case had been submitted to the court upon the record, the district court in March 1992 entered judgment for Local 18.[2] The court held that the union had not opened the *Buckeye Engineer* to the opinions of its members as required by *Knox County*. According to district court, Miller, as editor, had the discretion to select what articles were printed. Therefore, his refusal to publish plaintiff's letter was not an unreasonable act of censorship in derogation of any rights to free speech which plaintiff might enjoy under the Act. The district court further concluded that the relief requested would result in an unjustified interference with internal union affairs, and also indicated that plaintiff may have failed to exhaust his intra-union remedies. Plaintiff appeals these rulings.

III.

Local 18 asserts that this court should not hear the appeal because plaintiff failed to pursue his remedies within the union before filing suit. *See* 29 U.S.C. § 411 (a)(4). We disagree. The union has not cited any pertinent remedies in its bylaws for the refusal to print a letter in the union newsletter. *See Verville v. International Ass'n of Machinists & Aerospace Workers*, 520 F.2d 615, 620 (6th Cir.1975) (exhaustion under § 411

[2] Miller died during the pendency of this case.

(a)(4) not required when union remedies are inadequate); *see also Keeffe Bros. v. Teamsters Local 592*, 562 F.2d 298, 303 (4th Cir.1977) ("a free speech violation generally justifies dispensing with administrative remedies"). Accordingly, this court has jurisdiction to hear plaintiff's appeal.

IV.

In order to determine if Miller's refusal to publish plaintiff's letter violated the Act, we must ascertain whether the *Buckeye Engineer* was such a "*protected, open* and *exclusive* forum of communication" that Miller was prohibited from "unreasonably refusing to allow co-owners access to that forum based solely upon the *content* of their expression." *Knox County*, 720 F.2d at 941.

Initially, we note that since members have no access to the local's mailing list, the *Buckeye Engineer* is the exclusive means of communication for members wishing to present an alternate point of view to other union members. Moreover, member dues are the sole source of financing for the newsletter. As in *Knox County*, therefore, the publication is literally " 'owned' in equal shares by the members whose union dues finance [it]." *Id.* at 940. Finally, it is clear from the record that Miller's rejection of plaintiff's letter was entirely content-based.

Consequently, we are left with the question whether Miller and Local 18 had " 'opened the forum' of its publication" so that they were required to print plaintiff's letter in the *Buckeye Engineer*. *Id.* After a thorough review of the record, we conclude that, under the unique facts of this case, they had. We therefore reverse the judgment of the district court.

The record shows that on occasion Miller used the publication to defend against what he viewed as attacks by critics of Local 18, or, in a broader sense, challenges by legislators to the labor union movement in general. An example, of course, is Miller's April 1984 article dismissing as without foundation a congressional inquiry

into charges that the local was engaging in discriminatory practices.

In addition, the newsletter regularly ran articles authored by then-Ohio Governor, Richard Celeste. The articles touted various programs of the Celeste administration that were favorable to organized labor, in a one-sided manner reminiscent of an advertisement by a candidate for political office.

Moreover, in 1986 the newsletter printed an anonymous letter from "A Brother Engineer" denouncing the reform efforts of union rebels. The letter stated:

> This local Union, along with all organized labor, is being attacked from many sides. No longer are we able to form ranks as we have in the past.
>
> Our foes are far too subtle for that. Instead, they use unfair legislation, twist the meaning of existing law to serve their own purposes and use every device possible to tear down and destroy what we all have worked so hard for, for so long.

The letter concluded by urging members to support Miller, both morally and monetarily, so that he would have a "fighting chance." [3]

What these examples reveal is an informal policy by those in charge of the *Buckeye Engineer* to use it as a platform for the opinions of individuals who supported Local 18's incumbent management and its views. To permit those leaders consistently to promote one point of view on internal union disputes, while effectively

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[3] Local 18 insists that this was not a letter from an actual union member but was merely "a draft created solely for the Union administration to communicate with the membership as a whole." However, the fact that the union generated an anonymous letter to encourage support for Miller, far from suggesting that the *Buckeye Engineer* was not an open forum, actually strengthens plaintiff's claim that he should have an opportunitiy to present an opposing viewpoint.

silencing the opposition by withholding the only feasible channel of communication, would contravene the Act's overriding objective of promoting union democracy.

Accordingly, we conclude that the *Buckeye Engineer* was an "open forum" for the discussion of union issues, within the meaning of *Knox County,* to the extent that plaintiff should have been permitted to respond to Miller's article criticizing plaintiffs action in speaking out against union management.

We decline, however, to frame a remedy as broad as plaintiff requests. On the basis of the record in this case, we would not be warranted in ordering the *Buckeye Engineer* to adopt general procedures accommodating the publication of members' views, because at this point such a broad prospective order would amount to an unjustifiable judicial interference with internal union affairs. This record does not reveal a pattern or magnitude of violation of the Act that would warrant such judicial intervention at this time. Our holding, that the *Buckeye Engineer* was required to print plaintiffs letter, adequately places defendants on notice that they must comply in the future with their obligation to accommodate free discussion by members in the pages of that publication. Accordingly, this cause is remanded to the district court for entry of an order directing defendants to print plaintiff's letter in its entirety, and, in view of plaintiff's success in this action having rendered a substantial service to his union as an institution and to all of its members by vindicating his own right of free speech as guaranteed by the Act, to consider an award of reasonable attorney's fees as prayed for by plaintiff. *See Hall v. Cole,* 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973).

V.

The judgment of the district court is reversed, and this cause is remanded to that court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

No. C84-3140

ERVIN SHIMMAN,
Plaintiff,

v.

FRANK J. MILLER, *et al.*,
Defendants.

ORDER

[Filed March 30, 1992]

THOMAS D. LAMBROS, CHIEF JUDGE

This case was submitted for trial on the record before the undersigned Judge, with the parties agreeing to submit as evidence of trial all exhibits marked and identified with both parties' summary judgment motions. The parties further stipulated that the briefs in support of said summary judgment motions are to be treated as trial briefs. At the request of defendants, the parties were given thirty day to file proposed findings of fact and conclusions of law.

Although all four Counts of plaintiff's Complaint were briefed in the cross-motions for summary judgment, plaintiff subsequently filed a motion for dismissal of Counts I, III and IV. On August 30, 1991, this Court dismissed and terminated said Counts. The issue to be decided in Count II of the Complaint whether "the facts of the instant case amount to a violation of the LMRDA as defined by *Knox*" (Defendant's Brief in Opposition, p. 2;

See also Plaintiff's Reply to Defendant's Brief in Opposition, p. 2). Specifically, the issue addressed in Count II of the Complaint is whether the Union's refusal to publish plaintiff's letter in the Union newspaper, the *Buckeye Engineer,* of which defendant Miller was the editor, violates the right to free speech as guaranteed under 29 U.S.C. § 411(a)(2). On September 11, 1991, defendant Frank Miller filed a motion to dismiss party Frank Miller who is now deceased. Said motion is hereby granted and defendant Frank Miller is dismissed from this action.

Plaintiff had testified before the Committee on Labor and Human Resources of the United States Senate. Subsequently, the following article appeared in the *Buckeye Engineer*:

> Recently Local 18 received a letter from the Senate Committee on Labor and Human Resources asking Local 18 to appear and testify. Please understand, contrary to allegations, Local 18 is not under investigation. This Senate Committee was only taking testimony for proposed labor legislation.
>
> The notorious anti-union senator, right-wing Republican Orin Hatch from Utah, conducted the hearings in absence of other committee members, with the exception of brief appearances by two fellow conservative Republicans. The hearings were neither fair nor impartial.
>
> Two members of Local 18 were permitted to testify as was a lawyer representing members suing Local 18. Although the committee was notified in advance, Local 18's lawyer was not permitted to testify or present documents which would have clearly shown that the allegations and accusations were false or misleading. Most of the events giving rise to the allegations made by the two Local 18 members occurred in the late 1960's and mid-1970's, all

of which have been litigated in the courts and are still pending on appeal.

Plaintiff subsequently wrote a letter to defendant Miller responding to the article in the *Buckeye Engineer* and requesting that the contents of the letter be published in a later issue of said newsletter. Plaintiff's letter states:

> I appeared before the Senate Committee on Labor and Human Resources of which you in your "Report to the Members" in the April 1984 issue of the Buckeye Engineer called this a Anti-Union Senate hearing.
>
> The truth is this hearing was held for the allegations of corruption in the I.U.O.E. of Louisiana Local 406 and Ohio Local 18.
>
> Testimony was given not just of happenings in the past but right up to the present day.
>
> Testimony was given as to the manipulation of the Referral by friends and relatives of Business Agents and Officers of Local 18. Local 18 continues to discriminate in favor of Business Agents and Officers' friends and relatives.
>
> Officers and Agents continue to try to remove members off their jobs.
>
> Business Manager Miller was invited to testify but declined.
>
> Local 18 counsel William Fadel, was offered to present material to the Committee but never did.
>
> Testimony was given as to the articles in the Buckeye Engineer being one-sided.
>
> As you being the editor, I am asking you to print this article so I too can get the truth before all the members of Local 18.
>
> Member of 38 years in Local 18.

Defendants declined to publish plaintiff's letter on the ground that the Buckeye Engineer, pursuant to policies established by the duly elected Executive Board, has not been opened up to the speech of either members or merchants inasmuch as it does not publish either paid advertisements or editorial opinions of its members. Plaintiff alleges that by publishing the column and refusing to publish his letter, defendants violated various provisions of the Labor Management Reporting and Disclosure Act.

Specifically, plaintiff asserts in Count II of the Complaint that defendants' refusal to publish plaintiff's letter violates his right to free speech as guaranteed by 29 U.S.C. § 411(a)(2). Section 411(a)(2) states:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Plaintiff relies on *Knox County Local, National Rural Letter Carriers Assoc. v. National Rural Letter Carriers' Assoc.*, 720 F.2d 936 (6th Cir. 1983) to support his position that the Labor Management Reporting and Disclosure Act ("LMRDA") requires a union to publish the views of its members in the union newspaper. In *Knox*, the Sixth Circuit stated that "Prevailing First Amendment principles therefore prevent those in 'control' of a protected, open and exclusive forum of communication from

unreasonably refusing to allow co-owners access to that forum based solely upon the content of their expression." *Knox,* 720 F.2d at 941. The Court in *Knox* found that the national union had "opened the forum" of its publication by accepting the commercial speech of its members and of merchants. Having opened its magazine to its members and to outside merchants, which effectively opened the forum to the public, the court concluded that the national union could not unreasonably preclude advertisements submitted by its members based on their content. *Knox,* 720 F.2d at 940.

Unlike the magazine in *Knox,* the *Buckeye Engineer* does not accept any ads. *See Murphy v. Intern. Union of Operating Engineers,* 774 F.2d 114, 132 (6th Cir. 1985). Furthermore, as the *Buckeye Engineer,* pursuant to policies established by the duly elected Executive Board, does not publish editorial opinions of its members, it has not opened up to the speech of either merchants or members of the union. In view of Local 18's policy of not using the *Buckeye Engineer* as a "public forum," what articles are published lies within the discretion of the Union's Business Manager. *Knox, supra*; *Sheldon v. O'Callaghan,* 497 F.2d 1276 (2nd Cir. 1974), *cert. denied,* 419 U.S. 1090 (1974); *Members for a Democratic Union v. Local 1011, Communications Workers of America, AFL-CIO,* 697 F.Supp. 771 (S.D.N.Y. 1987); and *Roman v. New York State Teachers,* 655 F.Supp. 422 (S.D.N.Y. 1987). Therefore, defendants' refusal to publish plaintiff's letter does not constitute an unreasonable act of censorship in derogation of plaintiff's rights under § 411(a)(2).

Defendant Frank J. Miller, as Business Manager of Local 18, was also the Editor of the *Buckeye Engineer* and was directed in his administration thereof by policies laid down by the Local Union's Executive Board. *See* Article XXIX Section 2 of Local 18's By-Laws. Pursuant to the internal complaint procedures set forth in Article XXII of Local 18's By-Laws, plaintiff, before filing this

lawsuit, should have first brought his complaint to the District Representative, second, to the District Advisory Board, third, to the Business Manager and fourth, to the Executive Board. A granting of plaintiff's relief by this Court would in essence make this Court the Editor of the *Buckeye Engineer,* which would result in "unjustified judicial interference with internal union affairs." *Murphy,* 774 F.2d at 132; *Knox,* 720 F.2d at 939.

Accordingly, because the *Buckeye Engineer* has not been opened as a "public forum," what articles are published lies not within the judgment of this Court, but rather within the discretion of the Union's Business Manager. Defendants' refusal therefore to publish plaintiff's letter does not constitute an unreasonable act of censorship in derogation of plaintiff's rights under § 411(a)(2). Judgment is hereby entered in defendants' favor. This case is dismissed and terminated.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
Chief Judge
United States District Court

At Cleveland, Ohio
Dated: March 30, 1992

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 92-3399

ERVIN SHIMMAN,
Plaintiff-Appellant,

v.

FRANK J. MILLER, ETC., *et al.*,
Defendants-Appellees.

ORDER

[Filed July 27, 1993]

BEFORE: NORRIS and SILER, Circuit Judges; and HOOD,* United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE
COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

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* Hon. Joseph M. Hood sitting by designation from the Eastern District of Kentucky.